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APR 20 2007

OFFICE OF PETITIONS

In re Application of :
Reuben Hertz :
Application No. 09/939,865 :
Filed: August 27, 2001 :
Attorney Docket No. :

ON PETITION

This is a decision on the renewed petition under 37 CFR 1.181 filed on January 20, 2007, to withdraw the holding of abandonment. This is also a decision on the petition under 37 CFR 1.137(b) also filed January 20, 2007.

The renewed petition under 37 CFR 1.181 is **DISMISSED**.

The petition under 37 CFR 1.137(b) is also **DISMISSED**.

TREATMENT UNDER 37 CFR 1.181

The application became abandoned on July 29, 2006, after no response was received to the Notice of Allowance and Issue Fee Due mailed April 28, 2006, which set a statutory period for reply of three-months from its mailing date. No response was received within the allowable period, and the application became abandoned on July 29, 2006. A Notice of Abandonment was mailed on August 30, 2006.

In the instant renewed petition, petitioner maintains that the issue fee and publication fee were timely paid, but were directed to an incorrect application because petitioner used an issue fee transmittal form belonging to another patent application. Petitioner concedes that none of the identifiers cited on the issue fee transmittal were correct, but that the USPTO had sufficient time before the expiration of the three-month statutory period for reply to the Notice of Allowance and Issue Fee Due to inform petitioner of the error.

Section 502 of the *Manual of Patent Examining Procedure* provides, in pertinent part, that:

All correspondence related to a national patent application already filed with the U.S. Patent and Trademark Office must include the identification of the application number or the serial number and the filing date assigned to the application by the Office. Any correspondence not containing the proper identification set forth in 37 CFR 1.5(a) will be returned to the sender by OIPE. Each paper should be inspected to assure that the papers being returned contain either an "Office Date" stamp or a TC date stamp. A minor error in the identification of the application can be corrected by the Office provided the correct identification can be quickly discovered. Examples of minor errors are transposed numbers, typographical errors, and listing the parent application number. The failure to give any application number is not a minor error. The Office often experiences difficulty in matching incoming papers with the application file to which they pertain because insufficient or

erroneous information is given. This applies especially to amendments, powers of attorney, changes of address, status letters, petitions for extension of time, and other petitions.

A review of the evidence submitted with the instant petition reveals that the issue fee transmittal form filed to pay the issue and publication fees did not contain any identifier that would have allowed the Office to match the payments with the correct application. The submission of an issue fee transmittal form containing no identifier that would have permitted the USPTO to match the form with the correct application is not a minor error. Once an action is issued, such as the Notice of Allowance and Issue Fee Due, it is incumbent upon the applicant to ensure that a proper and timely response is filed prior to the expiration of the period set for reply. Where such a flagrant error in identifying an application is made, the USPTO does not have to go through extraordinary means to match a response to its correct application. It is again concluded that the application is correctly noted as abandoned because the neither the issue fee payment or the publication fee were noted as being received in the patent application 09/939,865 prior to the expiration of the three month statutory period and applicant provided no reasonable way for the Office to associate the payments made with the correct application. The petition under 37 CFR 1.181 is dismissed accordingly.

The issue fee payment and publication fee payment credited to patent application 10/704,517 has been transferred to patent application 09/939,865.

TREATMENT UNDER 37 CFR 1.137(b)

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition" under 37 CFR 1.137(b)."

Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply, unless previously filed. In a non-provisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee, or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.
- (2) the petition fee as set forth in 37 CFR 1.17(m);
- (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and
- (4) any terminal disclaimer (and fee set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition does not satisfy the requirements of item (2) above.

The petition fee of \$750.00 was not found with the instant petition, despite petitioner's assertion to the contrary. The renewed petition must be accompanied by the petition fee in order to be considered grantable.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
 United States Patent and Trademark Office
 Box 1450
 Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned (571) 272-3222.



Kenya A. McLaughlin
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Office of Petitions